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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY THOMAS RAUEN, Defendant and Appellant.	A122686 (Solano County Super. Ct. No. FCR247868)

Defendant Timothy Thomas Rauen appeals a judgment following his conviction as a result of a no contest plea to possession of methamphetamine and possession of a deadly weapon. Defendant challenges the denial of his motion to suppress evidence pursuant to Penal Code[1] section 1538.5. We affirm.

Procedural History

Defendant was charged by complaint with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); possession of a deadly weapon (a "billy" club) (§ 12020, subd. (a)(1)) and carrying a dirk or dagger (§ 12020, subd. (a)(4)). Defendant pled not guilty and filed a motion to suppress under section 1538.5. The magistrate denied the motion and held defendant to answer on the charges in the complaint.

The District Attorney subsequently filed an information alleging the charges from the complaint. Defendant renewed his motion to suppress under section 1538.5,

[1] All statutory references are to the Penal Code unless otherwise noted.

subdivision (i) and filed a motion to set aside the information under section 995. The trial court denied the motions.

Defendant later pled no contest to possessing methamphetamine as alleged in count one and possessing a deadly weapon as alleged in count two. The third count of carrying a dirk or dagger was dismissed. Consistent with the terms of the negotiated plea, imposition of a three-year, eight-month sentence was suspended, and defendant was placed on probation. Defendant filed a timely notice of appeal.

Factual History

The following evidence was presented at the preliminary hearing:

At approximately 2:20 a.m. on September 18, 2007, Police Officer Dale Golez went to a market on Travis Boulevard in Fairfield to conduct a business security check. As he arrived, he noticed defendant standing next to the driver's side door of a Cadillac that was parked in front of the store. Golez walked into the store and spoke briefly with the clerks. One of the clerks told Golez that a few minutes earlier he had seen what appeared to be a black handgun fall out of the Cadillac when defendant opened the driver's side door. The clerk told Golez that the driver picked up the gun, put it back in the driver's side of the car, and closed the door.

As Golez left the market to make contact with the occupants of the Cadillac, he radioed dispatch, mentioning the possibility of "a gun in the vehicle" and asking for backup. Although defendant was no longer near the car when Golez approached, Golez asked the two passengers in the Cadillac to place their hands where he could see them. When defendant returned to the Cadillac, Golez told defendant to stop and asked him to place his hands on top of his head. Defendant complied, and volunteered, " 'It's just a toy. It's just a toy gun. It's not real.' "

As defendant was handcuffed, Golez noticed what appeared to be the handle of a knife in the pocket of defendant's pants. When the knife was removed Golez saw that it was in a locked-open position.

After defendant was handcuffed and the passengers were removed from the Cadillac, Golez searched the car. From outside the open driver's-side door, Golez leaned

in and saw what appeared to be a black metal 9-millimeter Beretta on the driver's-side floorboard. Golez picked up the gun and recognized that it was in fact a toy. From where he stood Golez looked directly into the pocket on the inside of the open driver's-side door. His flashlight illuminated what he recognized as methamphetamine in a small, clear pill case. He removed and opened the pill case to confirm that it was methamphetamine and then continued his search of the car, finding additional contraband in the passenger's purse, a homemade "billy-club" in the trunk, and additional methamphetamine in a lockbox in the trunk.

Defendant was arrested and read his *Miranda*[2] rights. Although he initially denied ownership of the methamphetamine, he later admitted that it was his.

Discussion

Under section 1538.5, subdivision (i), when a defendant unsuccessfully moves to suppress evidence at the preliminary hearing, the motion may be renewed at a special hearing in the superior court.[3] "At such a special hearing, and where, as here, the evidence is limited to the preliminary hearing transcript, the superior court is 'bound by the factual findings of the magistrate and, in effect, becomes a reviewing court drawing all inferences in favor of the magistrate's findings, where they are supported by substantial evidence.' [Citations.] [¶] On appeal, we do not review the findings of the superior court since it acts as a reviewing, and not a fact-finding court. Rather, 'the

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] Section 1538.5, subdivision (i), provides in relevant part: "If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, . . . the defendant shall have the right to renew or make the motion at a special hearing relating to the validity of the search or seizure . . . . If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. . . . The court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the court as to evidence or property not affected by evidence presented at the special hearing."

appellate court disregards the findings of the trial court and reviews the determination of the magistrate who ruled on the motion to suppress.' [Citation.] In doing so, 'all presumptions are drawn in favor of the factual determinations of the [magistrate] and the appellate court must uphold the [magistrate's] expressed or implied findings if they are supported by substantial evidence.' " (*People v. Snead* (1991) 1 Cal.App.4th 380, 384, fn. omitted.)

Defendant contends that the magistrate erred in denying the motion because the prosecutor failed to present admissible evidence establishing that Golez had probable cause to search the car. Defendant argues that Golez's testimony regarding what the clerk told him was inadmissible hearsay. The clerk's statements, however, were not admitted for their truth but for the nonhearsay purpose of explaining the officer's subsequent actions. Accordingly, the magistrate properly relied on the clerk's statements in finding that Golez had probable cause to search the car. (See *People v. King* (1956) 140 Cal.App.2d 1, 5 ["extrajudicial statements were offered in evidence not to prove the truth of the matter asserted, but to establish probable cause to effect the search and seizure. The truth of the information given to [the police officer] was not in issue, nor was it offered in evidence to prove any element of the offense against the appellant. The evidence in question was offered solely to establish that the officer had reasonable or probable cause to effect the search and seizure"].)

Defendant's reliance on the *Harvey-Madden* rule in this instance is misplaced. (*People v. Harvey* (1958) 156 Cal.App.2d 516; *People v. Madden* (1970) 2 Cal.3d 1017.) The so-called *Harvey-Madden* rule governs the manner in which the prosecution may prove the underlying grounds for an arrest when the authority to arrest was transmitted to the arresting officer through police channels. (*People v. Collins* (1997) 59 Cal.App.4th 988, 993.) Here, however, the clerk's statement of what he observed was made directly to Golez, not transmitted through police channels. In any event, the *Harvey-Madden* rule requires only proof that "the source of the information on which the arrest was based was ' "something other than the imagination of an officer" ' who did not testify." (*People v. Armstrong* (1991) 232 Cal.App.3d 228, 246.) Here, the clerk's statement that defendant

had placed a gun in the car was substantiated by the fact that what appeared to be a gun was found in the car where the clerk said it was placed and by defendant's voluntary statement that the gun was a toy.

Defendant argues that "even if the officer had probable cause at the outset of the [search], discovery of the toy gun destroyed any constitutional justification for the search, which lasted much longer than necessary." We disagree. Golez testified that from his location next to the driver's side door, he was able to see what he believed was methamphetamine in a pill case in the pocket of the door. The magistrate was careful to confirm with Golez that he saw and recognized the methamphetamine before he removed the pill case from the car door. Based on his plain view observation of the methamphetamine, Golez was justified in removing and opening the case to confirm his suspicion. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 [Under the plain view doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant"].) Even if Golez spotted the contraband while peering around the interior of the vehicle to be sure there was nothing else in the car that might have been a weapon, he did no more than stand in place as he quickly looked around and observed what appeared to be methamphetamine in the open door pocket. This was hardly unreasonable under the circumstances, and the fact that he shined a flashlight into the pocket made his conduct no less reasonable. (Cf. *People v. Woods* (1970) 6 Cal.App.3d 832, 834, 838.) The recovery of the methamphetamine then justified the further search of the car.

Disposition

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Jenkins, J.